DEC 5 2000

Supreme Court, U.S.
FILED
DEC 05 2000
CLERK

No. 99-2036

In the Supreme Court of the United States

THE GOOD NEWS CLUB, ET AL., PETITIONERS,

v.

MILFORD CENTRAL SCHOOL, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment permits the government to distinguish between "religious instruction" and "the teaching of values or morals from a religious viewpoint" for the purpose of excluding the former from a limited public forum.

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INTEREST OF THE *AMICI CURIAE*[1]

The decision of the Second Circuit is premised on the notion that it is "not difficult" for government authorities to distinguish between moral instruction "from a religious viewpoint," on one hand, and "religious instruction," on the other. *Good News Club* v. *Milford Central School*, 202 F.3d 502, 510 (2d Cir. 2000). Amici curiae are 20 theologians and scholars of religion from a variety of religious traditions. The purpose of this brief is to explain to the Court that the relationship between "moral instruction" and "religious instruction" is differently understood in different religious traditions, and in many is not understood as a coherent distinction at all. For a governmental body — even a court — to draw such a distinction would deeply entangle it in controversial theological judgments and would discriminate between theological views on that relation, in violation of the very First Amendment principles the Second Circuit intended to protect.

The signatories are theologians and scholars of religion representing a wide range of theological perspectives. In signing this brief, they do not indicate any agreement (or disagreement) with the content of the activities conducted by petitioner Good News Club, or with petitioner's religious doctrine. But they are united in the belief that the distinction drawn by the Second Circuit in this case should be rejected by this Court.

Elliott Abrams is President of the Ethics and Public Policy Center in Washington, D.C. He is the author of *Faith or Fear: How Jews Can Survive in a Christian America.*

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to its preparation and submission.

Texas at Austin. He is a philosopher of ethics and politics specializing in the relation of these subjects with Christian theology. The particular focus of his work is the tradition of Natural Law. His books include *True Tolerance: Liberalism and the Necessity of Judgment*; *Written on the Heart: The Case For Natural Law*; and *The Revenge of Conscience: Politics and the Fall of Man*.

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Rabbi Shalom Carmy is Consulting Editor of *Tradition*, a scholarly journal of the Rabbinical Council of America. He teaches Jewish Studies and Philosophy at Yeshiva University, and is Chair of the Curriculum Committee of Yeshiva College. He has published in various areas of Biblical theology, modern Jewish philosophy, educational issues, and the interface between philosophy and Jewish law. His publications include *Modern Scholarship in the Study of Torah: Contributions and Limitations*, and *Jewish Perspectives on the Experience of Suffering*. He is also one of the editors of Rabbi Joseph Soloveitchik's posthumous papers.

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SUMMARY OF ARGUMENT

The Court of Appeals held that a public school district may exclude from a limited public forum those groups that wish to engage in "religious instruction," while giving access to other groups that engage in "moral instruction," including moral instruction "from a religious perspective." 202 F.3d at 508. The court declared that such a distinction is "not difficult" to make. *Id.* at 510. A fuller understanding of the relationship between moral and religious instruction in various western religious traditions, however, reveals that this distinction is indeed "difficult," and certainly beyond the capacity of governmental officials and courts. In many traditions of moral and religious thought, the distinction cannot be drawn coherently at all. To allow access to public facilities to be restricted on the basis of such a distinction would therefore be viewpoint discriminatory, in violation of the First Amendment. Moreover, administration of such a distinction would result in needless governmental entanglement in controversial judgments regarding religious doctrine.

ARGUMENT

THE GOVERNMENT CANNOT COHERENTLY DISTINGUISH BETWEEN "MORAL INSTRUCTION FROM A RELIGIOUS PERSPECTIVE" AND "RELIGIOUS INSTRUCTION."

A. The Second Circuit's Attempt To Distinguish Between "Moral Instruction From A Religious Perspective" And "Religious Instruction" Presupposes The Correctness Of One View Of The Relation Between "The Good" and "God's Will."

This Court has unanimously held that the government may not exclude private speakers from a limited public forum on the ground that they wish to speak from a religious viewpoint. *Lamb's Chapel* v. *Center Moriches School District*, 508 U.S.

384 (1993). In an apparent attempt to distinguish *Lamb's Chapel*,[2] the court below held that while speakers engaged in the "teaching of values or morals from a religious viewpoint" are constitutionally entitled to participate in a limited public forum, speakers engaged in "religious instruction" are not. 202 F.3d at 504. Exclusion of "religious instruction," according to the Second Circuit, is a subject matter rather than a viewpoint-based distinction. *Id.* at 510-511.

The Second Circuit has waded into deep theological waters. From the beginning of recorded philosophy and theology, the relation between "God's will" and "the good" has been hotly contested. See Plato, *Euthyphro* (B. Jowett trans., 1988) (asking whether piety is good because the gods love it, or whether the gods love it because it is good); cf. *Genesis* 2:15-18; 3:1-24 (in which acquisition of "knowledge of good and evil" as something separate from the will of God is seen as the primal act of sin). For some, including all secularists and the adherents to a few religions, ethics and religion are distinct subjects. For others, including adherents to many of the mainstream religious traditions of the West, ethics and religion are inextricable: to do God's will is to do the good, and knowledge of the good is ultimately derived from knowledge of the character of God. In some traditions, the relation may be more subtle. For example, some traditions distinguish between reason and revelation, or between natural law and revealed law, within an overarching concept of God's sovereignty and His differing ways of revealing truth to human beings.

The Second Circuit seems unaware of any of this. Without any apparent recognition or acknowledgment that it was taking sides in a long-standing theological and philosophical controversy, the court simply presupposed that morality is independent

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[2] Oddly, the Second Circuit did not cite *Lamb's Chapel*, despite its obvious similarity to this case.

from divine will. According to the court, the teachings of petitioner Good News Club, in common with the groups that are permitted to participate in the forum (Boy Scouts, Girl Scouts, 4-H), "may involve secular values such as obedience or resisting jealousy." 202 F.3d at 509. Such instruction is permissible because it falls within the "subject matter" of "morality." *Id.* at 510.[3] But unlike the other groups, petitioner's teaching "contains an additional layer," namely its religious component. *Id.* at 509. That religious "layer," being a different "subject," may be excluded.

The trouble with this characterization of the issue is that it presupposes an answer to the question—that morality is derived from sources independent of religion. That is why the court categorized obedience and resistance to jealousy as "secular" values. Cf. *Exodus* 20:12, 17 (treating obedience and refraining from covetousness as divinely ordained commands). Once the field of ethics is revealed as ontologically "secular," petitioner's religious teaching can be treated as an entirely different "subject matter" — an additional, and presumably unnecessary, "layer."

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[3] The Community Use Policy of the Milford Central School District allows district residents to use school facilities outside of school hours for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community," subject to certain limitations. 202 F.3d at 504. In our view, therefore, the proper question in this case is not whether "religious instruction" falls within the same subject matter category as "moral instruction," but whether it "pertain[s] to the welfare of the community." Furthermore, we do not see how the government could answer that question in the negative without evincing a hostility to religion that is not permitted under the First Amendment. If this analysis is correct, there is no need to reflect further on the lower court's misguided distinction between "moral instruction from a religious perspective" and "religious instruction." Since that is the holding under review, however, we devote this brief to the distinction drawn by the court.

In distinguishing between "viewpoint" and "subject matter" discrimination, therefore, the court itself ironically fell into the trap of committing viewpoint discrimination: it adopted one view of the relation between "God's will" and "the good."

Even within its own terms of reference, the Second Circuit's distinction breaks down. The court concedes — as it must, in light of *Lamb's Chapel* — that the First Amendment protects moral instruction "from a religious perspective." 202 F.3d at 508. To say that there is a "religious perspective" on morality is to say that there are certain *reasons*, based on religious understandings and sources, for the moral propositions that are being instructed. How, then, can it be said that speakers may not call attention to those religious understandings and sources? How can the Second Circuit's distinction be enforced without denying the very right that this Court unanimously held was protected in *Lamb's Chapel*?

As theologians and scholars of religion, we do not all share the same opinion about the right answer to the perennial question of the relation between moral and religious truth. But all of us agree that neither government officials, nor courts, nor even the democratic will of the people, is entitled to declare a single answer to this question — let alone one as naive and simpleminded as that suggested by the Second Circuit.[4]

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[4] The Second Circuit also hinted at a different, but equally problematic, distinction between a group that merely "stat[es] its viewpoint" and one that "is focused on teaching children how to cultivate their relation with God through Jesus Christ." 202 F.3d at 510. But neither the Good News Club nor the other groups — nor any group seriously engaged in training children to grow into morally responsible individuals — stops at "stating its viewpoint." The essence of moral education of children lies in cultivating habits and sensibilities of good character, including love and admiration for role models such as parents, teachers, historical figures, and even (for Christians) Jesus Christ.

Affirmance of the decision below would place government officials as well as courts in an impossible position. First, in attempting to police the line between moral instruction "from a religious perspective" and "religious instruction," they would be forced to engage in a highly detailed examination of the content of the speech under review. This detailed surveillance and censorship is offensive to the constitutional values of both free speech and non-establishment. As the Court explained in *Widmar* v. *Vincent*, 454 U.S. 263, 269-270 n.6 (1981), "[m]erely to draw the distinction would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths * * *. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." See also *Thomas* v. *Review Bd.*, 450 U.S. 707, 715, 716 (1981) ("Courts should not undertake to dissect religious beliefs" and "are not arbiters of scriptural interpretation").

Second, any standard for drawing a line between "religious instruction" and "moral instruction from a religious viewpoint" would inevitably be arbitrary. If moral teaching from a religious perspective is constitutionally permitted, then presumably government officials and courts must tolerate a certain amount of religious content. (Surely the speakers are permitted to explain to their audience the sources of their "religious perspective" and why that perspective might be persuasive.) Yet, if religious instruction is truly "an additional layer" — and any group that devotes significant time to teaching about that "additional layer" can be excluded — then public officials and the courts must be alert to exclude those who go beyond a certain *de minimis* level of religious content. But how much is too much? Where there are no criteria for drawing the distinction, there is serious danger of favoritism, bias, and unequal application of the law. See, *e.g.*, *Frazee* v. *Illinois Dep't of Employment Security*, 489 U.S. 829, 833 (1989) (noting "the difficulty of distinguishing between religious and secular convictions"); *Thomas*, 450 U.S. at 714

("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task").

Indeed, it may be worse than that. The distinction may be self-refuting. If the court is correct that religious instruction is "an additional layer," it follows that the religious instruction is unnecessary and irrelevant to the moral instruction. (Otherwise, the layer would not be "additional" but foundational.) But if the religious component is unnecessary and irrelevant, then there may be no such thing as a "religious perspective" on moral issues. That would be like a "culinary perspective" on geometry. Either religious truth is a legitimate basis for moral reasoning, in which case "moral instruction from a religious perspective" makes sense and "religious instruction" is a necessary component of it, or religious truth is irrelevant (an "additional layer"), in which case there is no such thing as a "religious perspective," and "religious instruction" is a different subject from "moral instruction." By attempting to embrace both sides, the Second Circuit has prescribed for government officials and courts an impossible and self-contradictory task.

Third, by insisting that moral instruction is distinct from religious instruction, the Second Circuit is favoring one perspective on the morality-religion relation over others. There are few more fundamental divides than that between those who believe that "the good" is independent of "God's will" and those who believe the two are connected. Thus, the very drawing of the line violates the prohibition on viewpoint discrimination.

We are not saying that it is impossible to distinguish between religion and morality *from any particular point of view* (*e.g.*, the secular point of view). Thus, the government can address moral questions in its own (necessarily secular) speech without taking a position on religious questions. For example, the government is constitutionally permitted to advocate the morality of protecting the environment, while taking no position on whether this is required because God has entrusted humankind with a duty to be

good stewards of the earth. But the government cannot project such a distinction onto the private speech of religious speakers without violating basic First Amendment norms of viewpoint neutrality. Put another way, the government cannot in effect require private speakers to adopt a religion/morality dichotomy on pain of exclusion from limited public forums to which other citizens are presumptively welcome.

This problem will become clearer as we discuss the positions of various theological traditions on this question, to which we now turn.

B. The Relation Between Moral And Religious Propositions Is A Controversial Question Among Different Theological Traditions, And For Many Is Not A Coherent Distinction.

It is not possible to do justice to the many subtle and varied treatments of the problem at hand, even by the major religious traditions of the West, in the space of an amicus brief. Thus, our aim is simply to acquaint the Court with a small sample of the religious texts that have addressed this issue, in the hope that the Court will not repeat the mistake of the Second Circuit. That mistake was to presuppose that religious instruction is, by its nature, merely an "additional layer" upon, and not a foundational or intrinsic part of, moral instruction. We therefore emphasize religious texts that take the opposite view — that religious and moral instruction are a unified whole, or at least so deeply intertwined that they cannot be separated. We do not thereby intend to argue that this perspective is necessarily correct (though many of us do think so), but merely to warn the Court against thinking that "it is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." 202 F.3d at 510 (internal quotations omitted). With all respect to the Second Circuit, it is difficult indeed. Indeed, it cannot be done — at

least, it cannot be done without committing the very viewpoint discrimination that the court was attempting to avoid.

1. The Hebrew Bible

The rich ethical and theological resources of the Hebrew Bible defy summary in this brief space, and we would not be so presumptuous as to claim an authoritative interpretive stance. But it is safe to say that the Hebrew scriptures will not sustain the idea that the subject of morality is separate and distinct from the study of the character, will, and judgments of the Creator.

This can perhaps be seen most clearly in the argumentative structure of the Ten Commandments. On their face, the Commandments demonstrate the unitary connection between behavior and belief, praxis and dogma, ethics and ideology, practice and theology, and duty and doctrine.

For instance, the First Commandment — "Thou shalt have no other gods before me" — is an imperative that presupposes an indicative, "I am the Lord thy God, which have brought thee out of the land of Egypt." Both the indicative and the imperative are intrinsically religious. By contrast, the imperative of the Fifth Commandment — "Honor thy father and thy mother" — may be viewed as social or moral. Yet even this imperative includes a positive sanction — do this "that thy days may be long upon the land which the Lord thy God giveth thee" — that is intrinsically religious. Like intertwining threads of different colors, morals and religious beliefs are inextricably connected in this tradition. Severing one from the other tears the fabric of the faith that these directives codify.

Similarly, the prohibition on murder issued after the Flood was linked to the theological premise that man was created in the image of God. *Genesis* 9:6. And the great statement in the Book of Micah, summarizing "what is good," combines "moral" and "religious" elements: "to do justly, and to love mercy, and to walk humbly with thy God." *Micah* 6:8.

Other passages in the Hebrew Bible similarly assert an ethical/theological unity. Consider, for example, the following verses:

> *Proverbs* 3:5, 6: "Trust in the Lord with all thine heart * * * . In all thy ways acknowledge him, and He shall direct thy paths."
>
> *Ecclesiastes* 12:13, 14: "Fear God, and keep his commandments: for this is the whole duty of man. For God shall bring every work into judgment, with every secret thing, whether it be good, or whether it be evil."

Moral responsibility, in this construct, is enjoined on theological grounds. Thus, it is not possible to draw a line between the common duty of humankind and the content of divine will. Loving God and obeying His commandments are one and the same. Neither is a matter of merely "stating [a] viewpoint" (202 F.3d at 510), but of directing one's heart toward God. In short, these representative passages establish a psychological unity, where beliefs and morals are not separable categories, but are like two legs of the same breathing organism. To amputate one would cripple the organism.

Even the terminology of the Hebrew Bible militates against a dichotomy between "moral instruction" and "religious instruction." Consider, for example, the Hebrew term "knowledge" (*yd'*) — which, of course, is the intended result of instruction. As demonstrated by an examination of the contexts in which it is used, this term does not signify a mere intellectual assent or comprehension, but rather a knowledge born of personal experience. Indeed, the term *yd'* is commonly used in conjunction with other terms that graphically convey this sense of experience: intercourse (*Genesis* 4:1, 17), childlessness (*Isaiah* 47:8),

sickness (*Isaiah* 53:8), and punishment (*Jeremiah* 16:21).[5] Thus, the most repeated phrase in the Book of *Exodus*, "that they may know me" (6:7; 7:17; 10:2; 16:12; 29:46; 31:13), can be understood as a statement of the aim of the entire Book.[6] God's approach to humankind was to prove His compassion (3:7, 9, 16; 6:5) and covenant-keeping character (3:6, 15, 16; 6:3-5) by His actions. In this way the people would obtain an experiential knowledge of His nature. The sum of the resulting religion was to revere and experience God. It follows that the experience of God does not allow for a separation into artificial, arbitrary categories such as "religious/moral"; rather, the sum of Biblical religion engulfs the totality of a person's experience.

Similarly, the meaning of the Hebrew term "heart" (*lb*) also suggests that there is no intelligible distinction between morality and religion within the Biblical frame of reference. This wide-ranging term circumscribes its semantic cousins — "spirit," "mind," "bowels," and "inward part" — and connotes the entire inner person. The inner person (*lb*) and the outer person (*bcr*) together make up the whole person (*npsh*). Accordingly, the English term "heart," because it primarily connotes emotion, is only a partial equivalent to the Hebrew *lb* — perhaps the nearest English equivalent is "psyche." Its 856 appearances (including the verb *lbb*) indicate that it is the most common anthropological term in the entire Hebrew Bible.

Although *lb* includes the entire inner person, it has different emphases in various contexts. Emotionally, for instance, the *lb* experiences sorrow (I *Samuel* 1:8), anxiety (I *Samuel* 9:20), sympathy (*Hosea* 11:8), and joy (I *Samuel* 9:20). At the news of

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[5] See generally Rudolph Bultmann, *Ginosko*, in 1 Gerhard Kittel, ed., THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 696 (Geoffrey W. Bromiley ed. & trans., 1964).

[6] J. Kenneth Eakins, *The Plagues and the Crossing of the Red Sea*, 74 REVIEW & EXPOSITOR 477 (1977).

her pregnancy, Hannah's *lb* rose from sadness to joy (I *Samuel* 1:8; 2:1).

Volitionally, to "fear God" (*Jeremiah* 32:40), to "trust in the Lord" (*Proverbs* 3:5), and to choose obedience (*Daniel* 1:8) are all decisions the *lb* must make. Daniel decided in his *lb* "not to defile himself with the king's food" (*Daniel* 1:8). The people in Nehemiah's day had a *lb* "to work" (*Nehemiah* 4:6). In *Psalm* 20:4, *lb* and "plans" are paralleled synonymously.

Intellectually, the *lb* is the seat of the imagination (*Jeremiah* 14:14), visions (*Jeremiah* 23:16), insight (I *Kings* 5:9), and knowledge (*Job* 8:10). "The *lb* seeks knowledge" (*Proverbs* 8:5). When Samson told Delilah the secret of his strength, he imparted to her knowledge from his *lb* (*Judges* 16:15, 17, 18). The Psalmist hides God's word in his memory, or *lb* (*Psalm* 119:11). The Septuagint translates the intellectual sense of *lb* to the Greek term "understanding" (in *Proverbs* 3:7) or "mind" (in *Job* 7:17). The Second Circuit's idea that instructing the "mind" regarding the good is an entirely different "subject" than inclining "the heart" toward God therefore contradicts the psychological unity presupposed by the Biblical term, *lb*. In sum, the division of the realms proposed by the Second Circuit is psychologically as well as theologically artificial from the point of view presented in the Hebrew Bible.

Finally, the structure of legal and ethical precepts in the Hebrew Bible is not consistent with the morality/religion dichotomy posited by the court below. Legal dictates regarded by some as "secular" and "non-sectarian" are defined as expressly religious by the Hebrew Bible. Indeed, whereas the Second Circuit labeled the values of "obedience" and "resisting jealousy" as "secular values" (202 F.3d at 509), the Hebrew Bible does the opposite. See *Exodus* 20:12, 17.

A review of several key terms related to capital punishment as prescribed in the Hebrew Bible reveals not only the severity of violating God's moral precepts but also their pervasively

religious nature. For example, the death penalty is prescribed not only for murder (*Exodus* 21:12), kidnapping (*Exodus* 21:16), striking or cursing parents (*Exodus* 21:15, 17), and bestiality (*Exodus* 22.19), but for sorcery (*Exodus* 22:18), sacrificing to other gods (*Exodus* 22:20), and profaning the Sabbath (*Exodus* 31:14, 15). Capital punishment also applied to eating leavened bread at the time of unleavened bread (*Exodus* 12:15, 19), and copying the recipe of the anointing oil (*Exodus* 30:30,38). Lesser penalities were imposed for mistreatment of a widow, orphan, or alien (*Exodus* 22:24).

Regardless of the offense and particular sanction, however, all infractions were viewed in the context of the all-inclusive relationship between God and His people. God, who calls Israel "my son" (*Exodus* 4:22) and "my firstborn" (*Exodus* 4:22), also declares them a "valued possession" (*Exodus* 19:5), a "kingdom of priests" (*Exodus* 19:6), and a "holy nation" (*ibid.*). Nothing is outside the scope of God's direct rule. The literary structures and motifs of moral/legal injunction, father/son relationship, and possessor/possession relation imply a manner of thinking that is intrinsically theological, not one that permits a division between the "moral" and the "religious." The Second Circuit's proposed dichotomy thus cannot be projected onto those who follow the tradition of the Hebrew Bible (a group that includes many millions of Jews, Muslims, and Christians) without violence to the text.

2. Post-Biblical Judaism

Rabbinical teaching affirms and extends the orientation displayed in the Hebrew Bible. There may be debate about the extent to which human intuitions and reasoning play a role in Jewish legal deliberations (*halakha*), but there is no doubt that morality is primarily understood as the fulfillment of God's revealed will accompanied by the sanctions of divine displeasure and reward. A cursory review of the Holiness Code (*Leviticus* 19), interpreted by the authoritative legal midrash (*Safra*) and

Talmud, and as cited in the 11th century commentary of Rashi that has become virtually canonical, illustrates this. The Code's admonition that "One must revere father and mother and keep my Sabbaths; I am God" (19:3) teaches that respect for parents cannot override obligations to God: "for I am God — all of you are obligated to honor Me" (*Talmud bYevamot* 5b and Rashi).

Similarly, the duty to donate agricultural produce to the poor is justified with the phrase "I am the Lord your God," meaning, "I am the Judge who will collect [if you fail to do so]" (Rashi to *Leviticus* 19:10, based on Safra). The prohibition on giving misleading advice, "Do not place a stumbling block before the blind; and you shall fear your God" (19:14), is glossed by Rashi (based on Safra): "Because people cannot know whether the intent of this person was benevolent or malicious * * * it says that you must fear God who knows your thoughts." The exhortation not to "stand idly by when your neighbor is endangered; I am God" is explained by Rashi (following Safra) as a promise that God will faithfully reward and punish. When the sage Hillel reformulates the admonition to "love thy neighbor as thyself; I am God" (19:18) as the injunction not to do to your friend what you dislike (*Talmud bShabbat* 31a), Rashi explains that "your friend" refers to God. Morality is thus inseparable from the divine sanction and the divine encounter in this tradition.

In the medieval period, some Jewish thinkers constructively engaged with the Greek philosophical tradition. Consequently, they were inclined to believe that reason, unaided by revelation, could help human beings in their quest for moral truth. Yet even these philosophers insisted on the necessity of divine revelation as the basis for the absoluteness of the moral claim and for many aspects of its content. This is demonstrably the case with medieval rationalism's two foremost representatives.

Saadia Gaon (10th century), in his *Beliefs and Doctrines* (Book 3), maintains that all moral obligations are rooted in gratitude to God. Moreover, even when moral truths can be

deduced rationally, it is important that they be adhered to as manifestations of the divine will, for not all individuals will immediately arrive at these rational truths and none will possess them with absolute precision. Saadia's account of the Aristotelian mean (Book10) is likewise grounded in a theological account of human finitude: to adopt any character trait without qualification is wrong because it entails arrogating to oneself a divine infallibility.

Likewise, Maimonides, in his influential 12th century code of law, justifies his theologically modified version of the Aristotelian mean by arguing that it is identical to the divinely instituted "way of God," and fulfills the biblical commandment of *Imitatio Dei* (*Mishneh Torah*, "Laws of Character Traits," chapter 1). He also holds that no human being adhering to the law solely on the basis of his own reason, without believing in its revealed status, can be called "saintly" (*hasid*), but, at best, accounted as "wise" (*hakham*) ("Laws of Kings," chapter 10).

These are the views of the Jewish philosophers who valued Greek philosophical wisdom. It is natural, and correct, to infer that prominent authorities who did not share their orientation were even more skeptical about the possibility of presenting moral teaching without constant reference to divine instruction and example.

Contemporary Jewish thought, to a much greater degree than its classic sources, has devoted attention to the problem of discourse about morality in a pluralistic society. The following statement by Rabbi Joseph Soloveitchik (1903-1993), the preeminent rabbinic figure in American Orthodoxy, is taken from a set of guidelines on interfaith dialogue that have been adopted as binding by the Rabbinical Council of America, the largest grouping of Orthodox Rabbis in the United States. It is thus representative of a powerful standpoint of Jewish self-understanding as well as a perspective on the way in which

Jewish tradition conceives of other religious traditions. Rabbi Soloveitchik writes:

> As men of God, our thoughts, feelings, perceptions and terminology bear the imprint of a religious world outlook. We define ideas in religious categories and we express our feelings in a peculiar language which quite often is incomprehensible to the secularist. In discussions we apply the religious yardstick and the religious idiom. We evaluate man as the bearer of God's Likeness. We define morality as an act of *Imitatio Dei*, etc.

Rabbinical Council Record, Feb. 1966, reprinted in N. Lamm & W. Wurzburger, A TREASURY OF "TRADITION" 78-80 (1967). In sum, it is clear that post-Biblical Jewish thought primarily conceives of morality in relation to the will of God.

3. Islamic Sources

Historic Islamic law, the *Shari'a*, includes four components: the *Qur'an*, which has only 600 lines of defined legal stipulations;[7] the *Hadith*, which is comprised of statements and deeds of Muhammed and the Imams (Imams are the rightful successors to the Prophet in the Shiite branch of Islam);[8] the "ijma," which is the consensus of Islamic legal scholars;[9] and the "aqi," which is comprised of the sitting judges' analogical reasoning in adjudicating cases — *i.e.*, Islamic stare decisis.[10]

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[7] Michael M.J. Fischer, *Legal Postulates in Flux: Justice, Wit, and Hierarchy in Iran*, in LAW AND ISLAM IN THE MIDDLE EAST 115 (Daisy Hilse Dwyer ed., 1990).

[8] Nader Entessar, *Criminal Law and the Legal System in Revolutionary Iran*, 8 B.C. THIRD WORLD L.J. 91, 92 (1988).

[9] *Ibid.*; Fischer, *supra* note 7, at 121.

[10] Entessar, *supra* note 8, at 92; Fischer, *supra* note 7, at 121.

A variety of Qur'anic passages set forth a philosophy that extends to both life and doctrine, without a distinction between morals and beliefs. These passages posit a deity who is all-inclusive in governance and cannot be shirked in praxis or ideology:

> *Sura* 7:54: "Beware! His is the creation and His is the (right to) Rule."
>
> *Sura* 7:3: "Follow the revelation sent unto you from your Lord and do not follow the (so called) guardians other than Him."
>
> *Sura* 114:1-3: "Say (O Muhammad): I seek refuge in the Sustainer of mankind, the Sovereign (Ruler) of mankind, the Lord of mankind."
>
> *Sura* 12:40: "The (right of) Command is for none but Allah. He hath commanded that ye follow none but Him. That is the right way (of life)."
>
> *Sura* 3:26: "Say: O Allah! Owner of the Kingdom! Thou givest kingdom to whom Thou wilt and takest it away from whom Thou wilt."
>
> *Sura* 4:65: "Nay, O Muhammad! By thy Lord, they will not be believers until they accept you as the final arbiter in all their disputes and submit to your decision wholeheartedly without any heartache."
>
> *Sura* 13:111: "None is a partner in His Sovereignty."

These passages presuppose a unity of ethics and theology, life and belief, practice and doctrine, demanding that Islam (and Islam alone) be the source for both realms of human behavior.

4. The Pauline Epistles

The contribution of the Apostle Paul to the New Testament is second in size only to that of Luke, but it is first in terms of es-

tablishing a theological structure. Paul's contribution, as summed up in his thirteen epistles, establishes a theological infrastructure that weds behavior and belief, praxis and dogma, ethics and ideology, practice and theology, and duty and doctrine.

For example, Paul's *Letter to the Ephesians* is structured in two parts, with the first three of six chapters weighted toward belief, dogma, ideology, theology, and doctrine. The connective "therefore (*gar*)," found in the first verse of *Ephesians* 4, is thus a structural marker that signals the change of focus in the following three chapters (four through six), which are heavily weighted toward behavior, praxis, ethics, practice, and duty.

Paul's other epistles display a similar pattern. For instance, Paul's *Letter to the Galatians* is structured in three tiers, with the first two of its six chapters weighted toward a polemical defense of belief and doctrine, the next two chapters weighted toward an explication of belief and doctrine, and the final two chapters marked by its focus on behavior and duty. Similarly, the first eleven of the sixteen chapters of Paul's *Letter to the Romans* are heavily weighted toward a discussion of belief and doctrine. In classic Pauline style, however, the first verse of the twelfth chapter begins with the connective "therefore (*gar*)" — thus marking his transition to a new focus on practice and duty, which occupies the final five chapters of the book.

The "*gar*"—the "therefore"—is the lynchpin of the argument in these epistles. In direct opposition to the Second Circuit's notion that religion and morality are distinct and unrelated "layers" constituting different subject matter categories, Paul's terminology affirms a logical connection between the two. It posits both a theological or doctrinal framework and an ethical or practical consequence. The epistemological structure of one of the four principal contributors to the New Testament thus inextricably binds the idea of the confession of religious truth with an appeal to live in a manner that reflects one's beliefs. Dissecting these two intertwining fields would not only be

religiously impermissible, but psychologically impossible, in the tradition that follows the teachings of Paul.

5. Protestant Sources

As with many religious traditions, it is difficult to generalize about the views of Protestant Christian sources regarding the connection between ethics and faith. Protestant traditions range from Biblical prescriptivism not unlike that in Orthodox Judaism to a view of divine transcendence so profound that God's will becomes almost unintelligible and all is subsumed in love and wonder. But the Second Circuit's presupposition that a person's relationship with the Creator is merely an "additional layer," essentially irrelevant to the question of how we must live, is virtually incoherent from a Protestant perspective. Consider the first question of the *Westminster Shorter Catechism*, "what is the chief end of man?" "Answer: Man's chief end is to glorify God and enjoy him forever." Explaining this categorical imperative is I *Corinthians* 10:31: "whether ye eat, whether ye drink, or whatsoever ye do, do all to the glory of God." The most mundane of life's activities are thoroughly religious according to this Protestant epistemological construct.

With regard to eternal salvation, historic Protestantism typically places the accent on faith rather than ethics. However, faith (understood as trusting in God's forgiveness through the redemption effected by Jesus Christ) is not adhered to at the expense of ethics (living according to God's will). As the point is expressed in the *Epistle of James* (2:18, 20), "show me thy faith without thy works, and I will show thee my faith by my works. * * * But wilt thou know, O vain man, that faith without works is dead?"

Far from pitting faith against ethics, the several Protestant traditions (Lutheran, Calvinist, Wesleyan, Holiness, et al.) insist that a living faith will issue in a transformed life of loving obedience to God's will. Nor can the moral life be understood apart from faith, as though the latter were a "layer" added to the

former. On the contrary, the regenerate life of loving obedience is the work of the Holy Spirit given to those who accept Jesus Christ as their Lord and Savior. According to the teachers of the Reformation, men and women of faith love their fellows not out of forced conformity to law, but out of an internalized love of God that inspires "passion and love for all God's commands." Martin Luther, *The Larger Catechism*.

This Protestant perspective on moral instruction may be recognized in the Second Circuit's lengthy, if unsympathetic, depiction of what goes on at a meeting of petitioner Good News Club. See 202 F.3d at 504-506. To tell such a group that its focus on the child's "relationship with God" is a *different subject* than another group's teaching about morality is simply to disagree with their theological perspective. The First Amendment does not allow the government to exclude otherwise eligible speakers from a limited public forum on account of such a disagreement.

6. Roman Catholicism

The teaching of the Catholic Church accents the importance of the natural moral law that can be known apart from the revelation of God in Jesus Christ. This teaching has its source in, among other biblical texts, St. Paul's assertion that the lives of all people "show that what the law requires is written on their hearts, while their conscience also bears witness and their conflicting thoughts accuse or perhaps excuse them [on the day of judgment]." *Romans* 2:15. While the natural moral law can be known apart from special revelation, it is not autonomous in the sense of being independent from God's will. On the contrary, natural law is Divine law; it is written on the hearts of human beings by God, who is the Creator of all. In Catholic teaching, "moral instruction from a religious viewpoint" necessarily entails "religious instruction" with respect to the source of moral truth in God and His universal will for all people. Instruction in morality from a Catholic "viewpoint" is therefore inseparable from Catholic beliefs about God.

While the fundamental norms of morality are, according to Catholic teaching, knowable by reason alone, Catholics also believe that these norms are explicitly taught and applied in an authoritative manner by the bishops in union with the bishop of Rome, the Pope. In the Catholic understanding, teaching about morality necessarily entails teaching about the source of moral truth, the motivation for adhering to moral truth, and the specific content or subject matter of moral truth. Competent instruction in morals from a Catholic "viewpoint" necessarily entails a specific understanding of the authoritative instructor, namely, the Church as Catholics believe it is constituted by Jesus Christ Himself. Instruction in morals from a Catholic "viewpoint" is therefore inseparable from Catholics' beliefs about the Church.

Moreover, in Catholic teaching the moral life is inherently and necessarily connected to eternal salvation. Those who have explicit faith in Jesus Christ, as well as those who have only the law written on their hearts, will be judged with respect to their obedience to the will of God as known to them. In the words of the Second Vatican Council: "All the good fruits of our nature and enterprise, we will find them again, but freed of stain, burnished and transfigured, when Christ hands over [the Kingdom] to the Father." *Pastoral Constitution on the Church in the Modern World* at 39. Pope John Paul II writes in the encyclical, *The Splendor of Truth*, "[T]he Church knows that it is precisely *on the path of the moral life that the way of salvation is open to all*." Therefore, instruction in morals from a Catholic "viewpoint" is inseparable from Catholic doctrine about eternal salvation and the universal destiny of all humankind.

* * * * *

The Second Circuit's facile assumption that religious and moral instruction are different "subjects," and thus that a distinction can be drawn between those who teach morality "from a religious perspective" and those who simply teach "religion," is belied by the experience and teaching of many of this nation's

religious traditions. The line drawn by the court is incoherent in principle, and would be virtually impossible to administer in practice, without picking and choosing among different religious viewpoints regarding the relationship between "the good"and "God's will." At bottom, the holding of the court below restricts access to limited public forums to groups that are willing to compartmentalize their faith — to treat religion and morality, ethics and theology, as "different subjects." The First Amendment does not permit such a restriction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2000